Supreme Court, U.S.
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No. 93-1311

In The

Supreme Court of the United States

October Term, 1993

ROBERT GEORGE BURCHILL,

Petitioner,

versus

DOUGLAS KISH, *et al.*,

Respondents.

Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

BRIEF IN OPPOSITION

Henry S. Perkin,
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Respondent
County of Lehigh

QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S COMPLAINT WITH PREJUDICE BASED ON PETITIONER'S FAILURE TO OBEY A COURT ORDER REQUIRING HIM TO FILE AN AMENDED COMPLAINT BY A DATE CERTAIN.

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COUNTERSTATEMENT OF THE CASE

Petitioner, Robert George Burchill, and attorney, admitted to the practice of law before the Supreme Court of Pennsylvania and the United States District Court for the Eastern District of Pennsylvania, filed a complaint pursuant to 42 U.S.C. Section 1983 alleging that his civil rights were violated by Respondent County of Lehigh "County Respondents") and sixteen (16) additional respondents. Petitioner's complaint alleged that the County Respondents violated Petitioner's constitutional rights during the May 13, 1990 arrest of Petitioner and search of his home.

In response to various motions filed by all of the respondents, the United States District Court for the Eastern District of Pennsylvania (hereinafter the "District Court") entered an order on February 22, 1993 conditionally dismissing Petitioner's complaint subject to his right to file an amended complaint within 21 days. On March 9, 1993, the District Court entered an order granting Petitioner's motion to enlarge the time for filing an amended complaint. Under the terms of the March 9, 1993 order:

> Plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this order or this case will be dismissed with prejudice. *NO FURTHER EXTENSIONS WILL BE PERMITTED.*

Accordingly, Petitioner's amended complaint was to be filed by March 31, 1993, 21 days after the March 9, 1993 order. Petitioner, a practicing attorney, failed to file an amended complaint within the time period prescribed. Thereafter, on April 6,1993 the District Court entered an order dismissing Petitioner's complaint with prejudice as to all respondents.

Petitioner then filed an appeal to the United States

Court of Appeals for the Third Circuit (hereinafter the "Court of Appeals"). The Court of Appeals, by order dated November 12, 1993, affirmed the April 6, 1993 judgment of the District Court. By order dated December 16, 1993, the Court of Appeals denied Petitioner's petition for rehearing. Petitioner thereafter filed a petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

In his petition for writ of certiorari, Petitioner fails to identify how the decision of the Court of Appeals conflicts with the decision of another federal court of appeals on the same matter so as to call for an exercise of this Court's power of supervision. See Rule 10.1(a) of the Rules of this Court. The decisions of the District Court and the Court of Appeals are consistent with the judicial interpretations of Fed. R.Civ.P 41(b) which confirm a court's power to dismiss an action based on a plaintiff's failure to comply with an order of court.

Moreover, Petitioner has failed to offer any reason justifying relief from judgment under Fed. R.Civ.P. 60. In essence, Petitioner's argument is that the rules regarding computation of time set forth in Fed. R.Civ.P. 6 were not applied properly. Not only is this argument flawed, such an issue is not one which involves any "special and important reasons" justifying the grant of certiorari. Rule 10.1(a) of the Rules of this Court.

ARGUMENT

I. This Case Does Not Involve Special or Important Reasons for The Granting of Certiorari

As the Rules of this Court provide, certiorari will be granted "only when there are special and important reasons

therefor". Rule 10.1. The case at bar involves no such reasons and the decisions of the courts below realistically have no impact on anyone other than the parties to this suit. This Court has previously held that certiorari is to be granted only in cases involving principles, the settlement of which is important to the public generally rather than to the parties specifically, and in cases where there is a real conflict of opinion and authority between courts of appeals. *NLRB v. Pittsburgh S.S. Co.*,340 U.S.498, 95 L.Ed. 479, 71 S.Ct. 453 (1951).

In the present case, the decisions below involved the straightforward application of the Federal Rules of Civil Procedure and the very clearly stated directives by the trial court. Petitioner has identified no decision of any court of appeals that conflicts with the decisions of the courts below.

II. Dismissal of Petitioner's Suit Under Federal Rule of Civil Procedure 41(b) Was Proper

Under Federal Rule of Civil Procedure 41(b), where a plaintiff fails to comply with an order of court, a defendant may move for dismissal of the action. It is also well settled that a court may dismiss an action on its own motion where a plaintiff does not comply with an order of court. *Link v. Wabach R.R.*, 370 U.S.626,8 L.Ed.2d 734, 82 S.Ct. 1386 (1962); *U.S.N. Co. v. American Express Co.*, 55 F.R.D. 31 (E.D.Pa. 1972). The March 9, 1993 order of the District Court was clear and self -executing. The order mandated that Petitioner's amended complaint be filed within 21 days of the date of the order or the case would be dismissed with prejudice. There is no dispute that Petitioner's amended complaint was filed beyond this deadline. Petitioner was given ample opportunity to properly state his claims and file the

necessary pleadings.

A dismissal under Fed. R.Civ.P. 41(b) for failure of a plaintiff to comply with an order of court is a matter resting within the sound discretion of the trial court. Such a dismissal will be reversed on appeal only for an abuse of discretion. *Hewlett n. Davis*, 844 F.2d 109 (3rd Cir.1988). Where, as here, a litigant flagrantly violates or ignores a court order, a district court often has no appropriate recourse other than dismissal. *Mindek v. Rigatti*, 964 F.2d 1369 (3rd Cir. 1992).

III. Petitioner Did Not Advance Any Basis For Obtaining Relief From Judgment

Fed. R.Civ.P. 60 sets forth the bases for obtaining relief from a judgment or order: clerical mistakes; mistake, inadvertence, surprise or excusable neglect; newly discovered evidence; fraud; the judgment is void; the judgment has been satisfied; any other reason justifying relief from the judgment. Petitioner has not articulated any of these bases. Indeed, Petitioner filed his motion for relief from judgment on April 21, 1993 with the District Court, and then, before that motion could be considered, he filed an appeal to the Court of Appeals. As the District Court correctly observed, when Petitioner filed his appeal he deprived the District Court of jurisdiction over the case and prevented it from ruling on his motion for relief from judgment. *Shempp v. School District*, 184 F.Supp. 381 (E.D. Pa. 1959).

Petitioner's argument is based upon an erroneous interpretation of Fed. R.Civ.P. 6 that would presumably allow his amended complaint to be considered filed in a timely manner. It is beyond dispute that Petitioner's amended complaint was filed with the District Court on April 8,1993,

two days after the order dismissing the case was entered. Subsection(e) of Fed. R.Civ.P.6 provides that when a party is required to act within a prescribed period after the service of notice by mail,3 days shall be added to the prescribed period. Regardless of whether Petitioner chooses to interpret the date of the District Court's order as March 9, 1993 or March 11, 1993, his amended complaint was filed beyond the deadline taking into account the 3-day period set forth in Fed. R.Civ.P. 6(e).

Petitioner claims that because his amended complaint was mailed on April 5,1993, this constitutes timely filing. Under Fed. R.Civ.P.5(e), "filing with the court" is defined as the filing of a pleading or other paper with the clerk of court. Filing does not occur when a pleading or paper is deposited in the mail; rather, it occurs when the pleading is received by the clerk of court or the judge, in an appropriate case. Petitioner's assertion confuses the service of his amended complaint with the filing of his amended complaint. Under Fed. R.Civ.P. 5(b), service by mail is complete upon mailing. However, the same is not true of papers filed by mail. *Wiss v. Weinberger*, 415 F.Supp.293 (E.D. Pa. 1976). In summary, Petitioner failed to file a timely amended complaint in violation of a court order.

The issues raised by the Petitioner involve matters which were within the sound discretion of the trial court. They do not involve issues which are of such import as to require review by the Supreme Court of the United States.

IV. To the Extent That Petitioner's Motion Is Considered a Motion to Alter or Amend a Judgment It was Not Timely Filed

Federal Rule of Civil Procedure 59(e) requires that a

motion to alter or amend a judgment be served within ten days after the entry of the judgment. The ten-day time period contained in this Rule is jurisdictional and cannot be extended in the discretion of the District Court. See *Glass v. Seaboard C.L.R. Co.*, 714 F.2d 1107 (11th Cir. 1983). In the case at bar, the judgment dismissing the case was entered on April 6, 1993 and Petitioner's motion was not served until April 17, 1993, beyond the ten-day deadline. This time limitation is to be strictly construed. *McConnell v. Medical & Ben. Plan*, 778 F.2d 521 (9th Cir. 1985).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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home at 2120 Latta Street. Initially, they checked the said of the home and when they did not discover anything, they then proceeded to the front door. The door was closed, but the officers could see inside the home by looking through the glass located on either side of the door. Cpl. Kish could see inside an area later determined to be the kitchen, and observed that a light was on as well as the television. Cpl. Kish then rang the doorbell, and after doing so observed an individual, later determined to be the defendant, come from the kitchen area to the front door. The door was opened and Cpl. Kish was confronted by the defendant, who was wearing a jacket, sun glasses, his hair appeared wet, and most importantly he was carrying a gun in his right hand. The gun was a .357 magnum, which was loaded with five "jacketed hollow-point bullets". Additionally, when Officer Rehrig opened the cylinder, he discovered that directly in line

with the barrel was a discharged cartridge.

When Cpl. Kish observed the gun, he immediately shined his flashlight in the defendant's eyes, yelled "gun" to Officer Rehrig, and drew his service weapon. The defendant was ordered to drop his weapon and when he complied, Cpl. Kish "advised him to turn and face the wall, drop to his knees, and put his hands behind his head and interlock his fingers". The defendant complied and the officers secured him. Cpl. Kish also patted him down and in his right front pants pocket discovered a set of metal knuckles.

When the defendant was secured, Cpl. Kish went through the home to look for victims or other persons. The reason for this action was the information which brought them to the home, which included shots and a woman screaming. His route included the kitchen area, where he observed on the kitchen table, in plain view, a jar with green vegetable

matter, and a Miller Light can rigged for the smoking of marijuana.

Cpl. Kish continued to search for victims in the basement, and in plain view observed broken television sets with what appeared to be bullet holes in each one.

Upon completion of his search for victims and upon the arrival of the defendant's parents, defendant was removed from the residence and taken to a patrol vehicle by officers of the South Whitehall Police Department. While the defendant was being taken to the patrol vehicle, he threatened the officers and stated "I'm going to kill all of you".

From 2120 Latta Street the defendant was taken back to police headquarters, and at 23:24 hours was given his Miranda warnings. The defendant acknowledged his rights, waived them, and agreed to speak with Cpl. Kish. During the interview, he told Cpl. Kish that he had been drinking all weekend, and that he

had had approximately two six packs of Miller Light prior to the officers arriving. Initially, he told Cpl. Kish that he had not been shooting his weapon. but later stated that he was shooting the gun at a pheasant in the back yard. He also stated that "he likes to stand at the top of the steps and shoot his .357 magnum at the bottom of the steps as he was watching championship wrestling".

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT GEORGE BURCHILL	:	CIVIL ACTION
	:	
v.	:	NO. 92-2776
	:	
DOUGLAS KISH, SCOTT R. REHRIG, MICHAEL HARBOVE, DONALD K. MacCONNELL, ARTHUR SPITKO, THOMAS TOTH, SOUTH WHITEHALL POLICE DEPARTMENT, SOUTH WHITEHALL TOWNSHIP, KELLY WALDRON, ROBERT L. STEINBERG, LEHIGH COUNTY DISTRICT ATTY'S OFFICE, LEHIGH COUNTY, ALLENTOWN HOSPITAL/ HEALTHEAST, DR. PAUL GROSS, CLYDE R. BOWER, JOHN DOE and RICHARD ROE:	:	

ORDER

AND NOW, this 22nd day of February, 1993, plaintiff Robert George Burchill is apparently an attorney at law who has filed a Complaint on May 13, 1992 against fifteen defendants generally alleging causes of action under 42 U.S.C.A. Section 1981, 1982, 1983, 1985, and 1988, as well as under Amendments 4, 5, 6 and 14 of the United States Constitution. The causes of action all relate to plaintiff's arrest on May 13, 1990 and subsequent trial and mental health proceedings. We have before us a number of motions and responses which we dispose of as follows:

(1.) Defendant Allentown Hospital/ HealthEast, Inc.'s Motion to Dismiss filed September 30, 1992 is **GRANTED** without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order. Defendant Allentown Hospital/ HealthEast, Inc.'s Motion to Strike

Plaintiff's Answer filed November 16, 1992 is **DENIED AS MOOT.**

(2.) Defendant Dr. Paul Gross's Motion to Dismiss filed October 5, 1992 is **GRANTED** without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order. Defendant Dr. Paul Gross's Motion to Strike Plaintiff's Answer filed November 5, 1992 is **DENIED AS MOOT.**

(3.) Defendants Robert L. Steinberg and Kelly Waldron's Motion for Summary Judgment and to Dismiss filed October 21, 1992 is **GRANTED IN PART** and **DENIED IN PART.** The motion for summary judgment is **DENIED** without prejudice to said defendants' right to reassert it, if necessary, when discovery is complete. The motion to dismiss is **GRANTED** without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order.

(4.) Defendant Lehigh County's Motion to Dismiss filed December 3, 1992 is **GRANTED**

without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order.

(5.) Defendant Clyde R. Bower's Motion to Dismiss filed December 3, 1992 is **GRANTED** without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order.

(6.) Defendants Douglas Kish, Scott R. Rehrig, Michael Harbove, Donald K. MacConnell, Arthur Spitko, Thomas Toth, South Whitehall Police Department and South Whitehall Township's Motion to Dismiss filed December 28, 1992 is **GRANTED** without prejudice to plaintiff's right to plead over, if he can, within twenty-one (21) days of the date of this Order.

(7.) Plaintiff's Motion for Relief Pursuant to F.R.C.P. 56(f) filed January 25, 1993 is **DENIED AS MOOT.**

We expect and direct that plaintiff shall and will drop all causes of action

which are improper or which lack merit, and file a timely new proper pleading asserting any remaining causes of action within twenty-one (21) days of the date of this order. Any causes of action not reasserted in an Amended Complaint within twenty-one (21) days will be deemed dismissed with prejudice. The Amended Complaint shall be specific and shall make it clear, in separate counts, exactly what facts give rise to exactly what causes of action and exactly what defendants they are directed against. When necessary, plaintiff shall also explain why prior service was proper or timely. In this regard, we remind plaintiff of the numerous deficiencies alleged in the defendants' briefs and, in particular, we point out the following.

The general standard for pleading Section 1983 civil rights claims is a more stringent one. The requirement is that the complaint state facts upon which the court

can weigh the substantiality of the claim. Negrich v. Hohn, 379 F.2d 213, 215 (3rd Cir. 1967); Rotolo v. Burrough of Charleroi, 532 F.2d 920, 922 (3rd Cir. 1976); and LePlant v. Frazier, 564 F.Supp. 1095 (E.D. Pa. 1983). Under the standard, a plaintiff must state the conduct violating his or her civil rights, when and where the conduct occurred, and who was responsible. A complaint will be dismissed if it contains only vague and conclusive allegations. Boykins v. Ambridge Area School District, 621 F.2d 75, 80 (3rd Cir. 1980); Hall v. Pennsylvania State Police, 570 F.2d 86, 89 (3rd Cir. 1978). This standard operates to eliminate frivolous claims, and to guard the reputations of public servants who are particularly susceptible to these claims. United States v. City of Philadelphia, 644 F.2d 187, 206 (3rd Cir. 1980).

If plaintiff's constitutional claims do have merit, they can be sufficiently

vindicated by an action under 42 U.S.C. Section 1983 and there is no need or right to asset a cause of action directly under the Constitution. Rogin v. Bensalem, 616 F.2d 680, 686-87 (3rd Cir. 1980); Mahone v. Waddle, 564 F.2d 1018, 1024 (3rd Cir. 1977); DiGiovanni v. City of Philadelphia, 481 F.Supp. 1053, 1055-56 (E.D. Pa. 1979); Kedra v. City of Philadelphia, 454 F.Supp. 652, 679 (E.D. Pa. 1978). We also fail to see at this point exactly how a direct cause of action arises under 42 U.S.C. Section 1981, 1982 and 1988 (beyond requesting counsel fees). We direct plaintiff to read these sections before pleading over. Defendants' assert that plaintiff is white and not of the class protected by Section 1981.

There is no respondeat superior liability in Section 1983 cases. Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3rd Cir. 1976); Monell v. Dept. of Social Services, 436 U.S. 658, 691, 98 S.Ct.

2018, 2036, 56 L.Ed.2d 611 (1978). A complaint filed under 42 U.S.C.A. Section 1983 against a municipality or similar political subdivision must allege, (1) the existence of a custom or policy of the municipality which is of such long standing as to have force of law, and (2) that one or more than one of the municipality's employees violated the plaintiff's civil rights while acting pursuant to this custom or policy. See, Monell v. Dept. of Social Services, 436 U.S. 658, 691-94 (1978); DiGiovanni v. City of Philadelphia, 531 F.Supp. 141, 145 (E.D. Pa. 1982).

Additionally, the complaint must articulate a full factual basis sufficient to support the requisite allegations. See, LePlant v. Frazier, 564 F.Supp. 1095, 1098 (E.D. Pa. 1983), cited in Sambrick v. Borough of Norristown, 639 F.Supp. 1351 (E.D. Pa. 1986). Plaintiff must show an actual "affirmative link" between the occurrence of

police misconduct and the municipal policy or custom. Rizzo v. Goode, 423 U.S. 362, 371, 96 S.Ct. 598, 604, 46 L.Ed.2d 56 (1976). Plaintiff is required to plead these elements with particularity. Rotolo v. Burrough of Charleroi, 532 F.2d 920, 922 (3rd Cir. 1976). Furthermore, the policy underlying the more stringent pleading requirement in Section 1983 claims is even more pronounced when a municipality is charged with a violation under the statute. There is a public interest in protecting local government's files from overbroad and irrelevant inquiries. United States v. City of Philadelphia, 644 F.2d 187, 206 (3rd Cir. 1980).

On a more specific note, we also point out that a prosecutor has an absolute immunity under 42 U.S.C. Section 1983 even if the prosecutor's "malicious or dishonest action[s] deprive[]" someone of liberty. Imbler v. Pachtman, 424 U.S. 409, 427, 96

S.Ct. 984, 993, 47 L.Ed.2d 128 (1976). Similarly, all witnesses in judicial proceedings are immune from liability under 42 U.S.C. Section 1983. Briscoe v. Lahue, 460 U.S. 325, 334, 345, 103 S.Ct. 1108, 1115, 1120, 75 L.Ed.2d 96 (1983). Furthermore, "nothing in the language or legislative history of Section 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court acting within its proper jurisdiction has given the parties a full and fair opportunity to litigate federal claims." Allen v. McCurry, 449 U.S. 90, 103, 101 S.Ct. 411, 419, 66 L.Ed.2d 308 (1980); Switlik v. Hardwicke Co., Inc., 651 F.2d 852, 859 (3rd Cir. 1981).

Lastly, we warn plaintiff, who is acting as his own lawyer, of the provisions of Fed.R.Civ.P. 11 which provides in relevant

part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ....

An attorney's signature certifies that the attorney has satisfied three duties: (1) that he has read the documents; (2) that he has made a reasonable inquiry; and (3) that he is not acting in bad faith. Each duty is independent; the violation of one triggers Rule 11 sanctions. See 5A Charles A. Wright & Arthur r. Miller, Federal Practice and Procedure Section 1335 (1990). We will not repeat this warning again, and will impose substantial monetary or other

sanctions for any causes of action in an Amended Complaint which are brought in bad faith.

BY THE COURT:

Franklin S. Van Antwerpen, U.S.D.J./s/

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT G. BURCHILL, Plaintiff	:	
	:	No. 92-CV-2776
v.	:	
	:	Civil Action - Law
DOUGLAS KISH, et al., Defendants	:	

ORDER

AND NOW, this 9th day of March, 1992, upon consideration of plaintiff's Motion to Enlarge Time, it is hereby ORDERED: plaintiff's motion is hereby **GRANTED**. Plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this Order or this case will be dismissed with prejudice. **NO FURTHER EXTENSIONS WILL**

BE PERMITTED.

BY THE COURT:

Honorable Franklin S.
Van Antwerpen J./s/

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT GEORGE BURCHILL	:	CIVIL ACTION
	:	
v.	:	
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DOUGLAS KISH, SCOTT R. REHRIG, MICHAEL HARBOVE, DONALD K. MacCONNELL, ARTHUR SPITKO, THOMAS TOTH, SOUTH WHITEHALL POLICE DEPARTMENT, SOUTH WHITEHALL TOWNSHIP, KELLY WALDRON, ROBERT L. STEINBERG, LEHIGH COUNTY DISTRICT ATTY'S OFFICE, LEHIGH COUNTY, ALLENTOWN HOSPITAL/ HEALTHEAST, DR. PAUL GROSS, CLYDE R. BOWER, JOHN DOE and RICHARD ROE	:	NO. 92-2776

ORDER

AND NOW, this 5th day of April, 1993, the Court having previously dismissed all defendants by an annotated Order of February 22, 1993 with a notation that "any causes of

action not reasserted in an Amended Complaint within twenty-one (21) days will be deemed dismissed with prejudice," and the Court having issued an Order on March 9, 1993 granting plaintiff's motion to enlarge time, which Order granted an additional twenty-one (21) day period of time from march 9, 1993 for the filing of an Amended Complaint with the express notation that "plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this Order or this case will be dismissed with prejudice," and it appearing that no such Amended Complaint has been filed, **NOW THEREFORE**, the dismissals of February 23, 1993 are hereby deemed to be with prejudice and this case is **DISMISSED WITH PREJUDICE AS TO ALL DEFENDANTS AND CLOSED.**

BY THE COURT:

Franklin S. Van Antwerpen,
U.S.D.J./s/